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No. 96-626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GUY D. ADAMS, *et al.*,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS[1]

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1. The opposition to certiorari offers nothing to dispel the conclusion that the decision below directly conflicts with the Eighth Circuit's decision in *Trostel* v. *American Life & Cas. Ins. Co.*, 92 F.3d 736 (1996). The only basis for distinguishing *Trostel* advanced in the opposition is that *Trostel* involved the transfer of an obligor's responsibilities under a *lease*, while the decision below involved the transfer of an obligor's responsibilities under a *bond*. Opp. at 11. This Court's decisions have already established that the 1933 gold clause resolution applies with equal force to both railroad bonds and leases, *Guaranty Trust Co. of New*

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[1] Petitioners' Rule 29.6 statement appears at Pet. ii.

York v. *Henwood*, 307 U.S. 247 (1939) (railroad bonds); *Norman* v. *Baltimore & O. R. Co.*, 294 U.S. 240 (1935) (same); *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U.S. 324 (1937) (leases), and that the practical differences between leases and bonds upon which the court below relied, Pet. App. 12a, do not constitute a proper basis for distinguishing between them for purposes of the gold clauses, *id.* at 339-341.[2] Respondent has failed to offer any other grounds for reconciling the decision below with *Trostel*. The conflict between the decision below and that case is real and unavoidable, and this Court should grant certiorari to resolve it.

2. Respondent echoes the fundamental misperception of the court below that an agreement to assume an interest cannot constitute an obligation separate and apart from the underlying interest being assumed. Respondent's failure to acknowledge this key difference leads it to mischaracterize our position as permitting multiple issuances of the same bond. Our position is not that there were two issuances of a single bond obligation, but rather that there were two separate issuances of two different obligations: one issuance of the Hocking Valley bonds in 1899, and the separate issuance of an agreement by respondent to assume the pre-existing responsibilities under those bonds in 1992.[3]

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[2] The statutory language construed in these decisions was subsequently amended in 1977. Since nothing in the text or the legislative history of the 1977 amendment offers any indication that Congress intended to vary the effect of the statute depending on the type of instrument involved, the court below was still bound to construe the 1977 amendment in light of these decisions. *See St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 541 (1978) (unless Congress indicates otherwise, enactment of an exception to a statute should be read in light of the cases interpreting the statute being amended).

[3] For the same reasons, the cases relied upon by the opposition and the court below are inapposite. The factual situation in *Gold Bondholders Protective Council* v. *Atchison, Topeka & Santa Fe*

Moreover, since the 1992 supplemental indenture represented a new agreement, the parties were free to incorporate into it any additional terms they thought proper, irrespective of the terms of the underlying interest being assumed. It was thus perfectly appropriate for the supplemental indenture to incorporate the gold clause contained in the 1899 indenture by reference. Since this supplemental indenture properly constituted a post-1977 issuance of a new obligation, the court below should have concluded that this gold clause was enforceable.

3. There is no basis for respondent's suggestion that a transfer of an interest remains subject to the 1933 joint resolution unless it meets all of the requisites for a novation. The statute speaks only in terms of "obligation[s] issued," and there is no reason why the word "issued" should not be construed as covering a new agreement to pay pre-existing bond obligations according to their original terms.

4. It is simply not true that the petitioners in *Adams* v. *Burlington Northern Railroad*, 117 S. Ct. 171 (1996) (mem.), raised the same issues that the petitioners raise in this case. A review of the questions presented in that case reveals that the issues were entirely different than

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Ry., 649 P.2d 947 (Alaska 1982), and the hypothetical situation discussed *in dicta* in *Wells Fargo Bank* v. *Bank of America*, 32 Cal. App. 4th 424, 435 n.5, 38 Cal. Rptr. 2d 521, 528 n.5 (1995), only involved the purchase of bonds by new bondholders on the open market, and not an agreement by a third party to assume a corporation's responsibilities under a bond. Thus, in those cases, no third party ever undertook any new responsibilities that could arguably constitute the issuance of a new obligation, and the bondholders attempted to enforce gold clauses contained in the bonds themselves. In this case, there can be no dispute that CSXT's assumption of the payments of the Hocking Valley bonds represented a new, binding obligation that CSXT did not possess before. Since that new obligation clearly arose after 1977, any gold clause contained in it is enforceable.

those presented here. Specifically, the *Burlington Northern* petition presented questions regarding:

(1) the impact of this Court's decision in *Trebilcock* v. *Wilson*, 79 U.S. (12 Wall.) 687 (1872);

(2) the constitutionality of the 1933 joint resolution;

(3) whether the settlement of a lawsuit, certain corporate modifications, and certain changes in collateral created a new security; and

(4) whether the bondholders should have been permitted to conduct discovery on matters solely within the defendants' control.

Pet. for Cert. at i, 19, *Burlington N. R.R. Co.* (No. 96-51). None of these questions addressed the issue raised in this petition: whether a post-1977 assumption of interest constitutes the issuance of a new obligation under 31 U.S.C. § 5118(d)(2).

5. Finally, respondent has failed to establish that the 1996 amendment to 31 U.S.C. § 5118(d)(2) has rendered this petition moot. Notably, the opposition made no attempt to construe the clause rendering the 1996 amendment inapplicable "if the enforceability of that Gold Clause has been finally adjudicated before [September 30, 1996]." Pub. L. No. 104-208, § 2609, 110 Stat. 3009 (1996). No court has yet considered whether or how this amendment would apply to this case, and, as we pointed out in our petition, there are substantial questions surrounding its application. Pet. at 13 n.9. Should this Court grant the petition to address the conflict between this case and *Trostel*, there would be time enough to address these issues on remand from this Court.[4]

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[4] Alternatively, it would also be appropriate for this Court to vacate the judgment and remand the case for consideration of the question of mootness, *see, e.g.*, *Indiana Employment Sec. Div.* v. *Burney*, 409 U.S. 540 (1973) (per curiam); *Dupris* v. *United States*, 446 U.S. 980 (1980) (mem.), or for a determination of the

CONCLUSION

For the foregoing reasons, and those stated in the petition, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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effect of the new legislation, *see, e.g.*, *Bureau of Economic Analysis* v. *Long*, 454 U.S. 934 (1981) (mem.).